BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DAVID P. GOODSON Claimant	)	
VS.	)	Docket No. 1,057,615
GOODYEAR TIRE & RUBBER COMPANY Self-Insured Respondent	)	

ORDER

STATEMENT OF THE CASE

Respondent appealed the November 4, 2011, Preliminary Hearing Order entered by Administrative Law Judge (ALJ) Rebecca Sanders. John J. Bryan of Topeka, Kansas, appeared for claimant. Frederick J. Greenbaum of Kansas City, Kansas, appeared for respondent.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the November 2, 2011, preliminary hearing and exhibits thereto; and all pleadings contained in the administrative file.

ISSUES

Claimant alleges he suffered a back injury on August 19, 2011, and the cause of the injury was repetitively lifting and carrying liners on shells weighing from 30 pounds up to and including 100 pounds. Claimant alleges he had no back problems prior to August 19, 2011, and that it was the repetitive lifting of the heavy liners that caused the injury to his back.

Respondent asserts that claimant did not meet with personal injury by accident. However, if claimant did meet with personal injury by accident, the personal injury did not arise out of and in the course of his employment with respondent. Respondent contends that the work accident is not the prevailing factor causing claimant's injury. Alternatively, respondent asserts that claimant did not meet with personal injury by repetitive trauma. However, if claimant did meet with personal injury by repetitive trauma, the personal injury did not arise out of and in the course of his employment with respondent. Respondent

contends that the work-related repetitive trauma is not the prevailing factor causing claimant's injury.

Respondent also asserts, as a defense, that claimant recklessly violated a safety rule. The liners that claimant lifted would be single or double liners. Double liners weighed nearly twice as much as single liners. The lightest single liner weighed 35 pounds and the lightest double liner around 60 pounds. Respondent alleges that it put up a notice in claimant's work area that no employee should lift a double liner without the assistance of another employee and that claimant was told of this rule by his area manager. All of this allegedly occurred prior to claimant's injury. Respondent alleges that on the date of accident, claimant violated this "safety rule" by lifting double liners.

Claimant contends the aforementioned "safety rule" was not implemented until after his accident. However, if the safety rule was established prior to August 19, 2011, claimant was not aware of it. Claimant testified he does not recall lifting double liners on the date of the accident, but that if he did, lifting double liners was not reckless and there was insufficient proof that lifting double liners caused his back injury.

The ALJ found claimant suffered personal injury by repetitive trauma arising out of and in the course of his employment with respondent. The ALJ determined that claimant did not violate a safety rule as there was insufficient evidence to show that prior to the accident, claimant was warned about lifting double liners or had seen the notices. The ALJ designated Dr. Glenn Amundson as authorized treating physician for claimant. She also ordered respondent to pay for medical expenses on August 23, 2011, from Radiology and Nuclear Medicine and medical mileage incurred on August 23, 25 and 30, 2011, to be paid as authorized medical expenses.

The issues are:

1. Did claimant meet with personal injury by accident on August 19, 2011?

2. If so, did claimant's back injury arise out of and in the course of his employment with respondent?

3. Was claimant's work accident the prevailing factor that caused his injury?

4. Did claimant meet with personal injury by repetitive trauma on August 19, 2011?

5. If so, did claimant's back injury arise out of and in the course of his employment with respondent?

6. Was claimant's work-related repetitive trauma the prevailing factor that caused his injury?

7. Did claimant recklessly violate a safety rule established by respondent? Specifically, did claimant know of the safety rule against lifting double liners without assistance prior to the accident? If so, did he recklessly lift double liners without assistance and was that the cause of his injury?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

Claimant began working for respondent on January 29, 2001. In August 2011, claimant's job title was utilizer booker. This task entailed collecting liners at the start of each shift and throughout the course of his shift for running sidewalls. This required claimant to drive a tug. Claimant then puts the liners on the tug, which is a wagon, and takes them to the department where he works. This required claimant to move the liners from another wagon to his wagon. Then he would drive the liners to his department where he would lift them onto a machine. A liner consists of a shell, or hub, that is wrapped with material used to make the sidewalls of tires.

The liners are color coded and different colors mean different lengths and weights. A blue liner weighs 90 to 110 pounds; a green liner 70 pounds; a white liner 60 pounds; a red liner 50 pounds and a yellow liner 35 pounds. A double liner is a liner with twice as much material placed on a hub. A double liner is nearly twice as heavy as a single liner. Claimant testified that his department used liners weighing 35 pounds and double liners weighing 60 pounds. Claimant would normally put 60 to 100 liners on a wagon and would make 1 to 3 trips a day to get the liners.

On August 19, 2011, when he first came on his shift, claimant began booking tread instead of loading liners. Booking tread required claimant to stand and lift with a booking pole and move tire tread with his hand and put it in a tread trap. The pole weighs 20 pounds and the tread weighs 26 pounds, but a mechanical assist reduces the total weight to 20 pounds. Claimant lifted approximately 200 pieces of tread during the first half of his shift on August 19, 2011. After booking tread, claimant indicated in his preliminary hearing testimony that he delivered one wagonload of yellow-coded liners, which are the lightest liners with which he works. Claimant later testified at the preliminary hearing that he delivered two wagonloads of liners.

Claimant testified that he began having back problems over the course of the day on August 19, 2011. Prior to that date he had no problems with his back. The problems came on when he was lifting liners and loading them on a machine. He could not recall whether he had been lifting single or double liners.[1] The Application for Hearing filed by

[1] P.H. Trans. at 69-70.

claimant on September 14, 2011, alleged August 19, 2011, as the date of accident and the cause of accident as "repetitively lifting and carrying liners on shells, weights 30 to 100 lbs."

On August 20, 2011, claimant went to St. Marys Clinic in St. Marys, Kansas, where his personal physician practices medicine. The note from that visit lists sinusitis, right otitis and low back pain as assessments. Claimant returned to the clinic and saw Dr. C. Bruce Carroll, his personal physician, on August 22, 2011. The report from that visit states that for eight days, claimant has been having lower back pain. Dr. Carroll asked claimant about his work situation, and claimant described his work activities. Claimant also indicated they were short staffed at work for almost a year. Dr. Carroll stated in the report: "He describes the work that he does and I can certainly see this being an overuse phenomenon, a repetitive stress kind of injury even though there was not one particular moment that just killed him, that just knifed him. I can certainly see this being a cumulative effect from work."[2] Dr. Carroll's assessment was: "Low back pain. I suspect this is lumbosacral strain from work."[3] No temporary restrictions were given by Dr. Carroll.

On August 22, 2011, claimant completed an Initial Injury Report. He indicated on the report that he strained his back lifting liners.

On August 23, 2011, claimant saw Melissa West at the respondent's clinic, which is located in respondent's plant. Ms. West is a nurse practitioner who works for Concentra and is the clinic manager. Concentra provides medical services to respondent. Ms. West's August 23, 2011, report indicated that claimant complained of straining his back at work and he attributed this to lifting liners that had extra lining on them. According to the report, claimant then described picking up the heavier liners because the builders were lazy and made them that way and claimant had to do it to perform his job, even though his manager advised him not to do so. Ms. West examined claimant and indicated claimant had paraspinous muscle tenderness, a decrease in flexion and a decrease in extension. She prescribed conservative treatment and indicated that she would request x-rays of the thoracic and lumbar portions of claimant's spine. Ms. West gave claimant a temporary restriction of working at a reduced pace.

The lumbar and thoracic portions of claimant's spine were x-rayed on August 23, 2011. The x-rays were essentially normal. Ms. West saw claimant again on August 25 and 30, 2011. On August 25, 2011, Ms. West placed claimant on modified duty with certain restrictions, and on August 30, 2011, she placed claimant on modified duty with greater restrictions, including no standing, bending or twisting, and no lifting, carrying, pushing or pulling more than 40 pounds. The report from the August 30, 2011, visit indicates claimant's lumbar strain was worsening.

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[2] *Id.*, Resp. Ex. A.

[3] *Id.*

Respondent asserts that prior to claimant's injury, notices with a photo of a liner had been posted in claimant's department that state: "Attention!" and "If there is a liner roll that had 2 liners on it please seek assistance from another booker to remove liners."[4] Respondent contends that claimant should be denied workers compensation benefits because he recklessly violated respondent's workplace safety rule against lifting double liners.

Cynthia Nace, respondent's workers compensation and employee benefits manager, testified concerning claimant's alleged violation of respondent's safety rule of not lifting double liners without assistance. She indicated an investigation took place and in the course of the investigation, claimant told Ms. West and plant safety manager Jim Bartolivich that he injured himself while lifting overweight liners. Claimant also allegedly reported to the Local 307 pension and insurance chairman, Randy Hague, and to Rick Kober, who is the union safety chairman, that the injury occurred as a result of lifting liners that were too heavy. Ms. Nace also indicated that she spoke to Robert F. Kennedy, a production specialist for respondent. He told Ms. Nace that he warned the employees in claimant's department not to lift the double liners without assistance. Ms. Nace testified that Evan Hummer, claimant's area manager, reported to her of warning employees not to lift overweight liners.

Ms. Nace provided a report of incident that was completed by claimant, medical reports from the plant clinic, and related the information she gathered from Ms. West, Mr. Bartolivich, Mr. Hague and Mr. Kober to Karen Moenkhoff, a senior claims specialist. Ms. Moenkhoff sent a letter to claimant dated September 1, 2011, stating his claim was being denied workers compensation benefits because he was working ". . . against the safety pre-cautions *[sic]* that you were previously warned about."[5] After the claim was denied, claimant's restrictions "went out the door with the claim"[6] and he then worked with no restrictions.

Ms. Nace testified she received a telephone call from claimant on September 6, 2011. Claimant was upset with the letter from Ms. Moenkhoff denying his claim because of allegedly intentionally violating safety rules. Claimant told Ms. Nace that he had never been cautioned about lifting double liners and had not told anyone he injured himself while intentionally going against a management directive not to lift the liners by himself. Claimant specifically denied to Ms. Nace that he lifted double liners and told her that is not how he injured himself. Ms. Nace acknowledged she was never present when anyone warned claimant not to lift the double liners, nor did she have personal knowledge of when the notice was posted.

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[4] *Id.*, Resp. Ex. C.

[5] *Id.*, Cl. Ex. 1.

[6] *Id.*, at 80.

At the preliminary hearing, claimant introduced a job description of claimant's job. The job description listed the physical requirements of claimant's job. The job description indicated that claimant must be able to remove liner roll from a truck by lifting up to 70 pounds from 24 inches and 54 inches, carry 15 feet and place on a spindle at 18 inches and 48 inches.[7]

Robert F. Kennedy testified at the preliminary hearing that double liners exist in the area where claimant worked. He indicated that prior to August 19, 2011, employees had complained about the double rolls. He produced the notice that bookers should seek assistance when lifting double liners. The notices were 8½ inches by 11 inches in size. He put up two of the notices in claimant's work area which is 50 yards by 50 yards. He also sent an e-mail to all area managers telling them to inform their workers to get assistance when moving a double liner. Mr. Kennedy did not personally tell claimant to seek assistance when lifting a double liner and had no personal knowledge whether claimant's area manager gave claimant such a warning.

Claimant testified that prior to his accident, he did not observe notices indicating employees should not lift double liners without assistance. He testified that the notices were put up after his injury. Claimant testified that he observed other workers lifting double liners. However, they lifted only yellow, red or white double liners, as no worker could physically lift green or blue double liners.

PRINCIPLES OF LAW

The 2011 legislative session resulted in amendments to the Workers Compensation Act. L. 2011, Ch. 55, Sec. 1 provides in relevant part:

> (c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

L. 2011, Ch. 55, Sec. 3 provides in relevant parts:

> (a)(1) Compensation for an injury shall be disallowed if such injury to the employee results from:
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> (A) The employee's deliberate intention to cause such injury;
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> (B) the employee's willful failure to use a guard or protection against accident or injury which is required pursuant to any statute and provided for the employee;

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[7] *Id.*, Cl. Ex. 7.

(C) the employee's willful failure to use a reasonable and proper guard and protection voluntarily furnished the employee by the employer;

(D) the employee's reckless violation of their employer's workplace safety rules or regulations; or

(E) the employee's voluntary participation in fighting or horseplay with a co-employee for any reason, work related or otherwise.

(2) Subparagraphs (B) and (C) of paragraph (1) of subsection (a) shall not apply when it was reasonable under the totality of the circumstances to not use such equipment, or if the employer approved the work engaged in at the time of an accident or injury to be performed without such equipment.

L. 2011, Ch. 55, Sec. 5 provides in relevant parts:

(d) “Accident” means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. “Accident” shall in no case be construed to include repetitive trauma in any form.

(e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

. . . .

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

(i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;

(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3)(A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

. . . .

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[8] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[9]

[8] K.S.A. 44-534a.

[9] K.S.A. 2010 Supp. 44-555c(k).

ANALYSIS

Claimant alleges a low back injury caused by repetitive trauma arising out of and in the course of his employment with respondent. As succinctly and accurately stated by the ALJ in her Award: "Claimant is not claiming an acute trauma that caused back strain but a repetitive trauma over use *[sic]*."[10] Accordingly, this Board Member finds that claimant did not suffer a low back injury by accident arising out of and in the course of his employment with respondent. The issue of whether claimant's work-related accident is the prevailing factor causing his injury is moot.

Did claimant meet with personal injury by repetitive trauma arising out of and in the course of his employment with respondent? If so, was the work-related repetitive trauma the prevailing factor in causing claimant's back injury? In his brief, respondent's counsel correctly states that a repetitive injury must be demonstrated by diagnostic or clinical tests. Further, respondent's counsel avers that a repetitive injury is deemed to arise out of employment if the employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal nonemployment life, the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma, and the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

Dr. Carroll physically examined claimant and opined that claimant had a lumbosacral strain caused by overuse syndrome at work. Dr. Carroll did not immediately order x-rays, but recommended them if the pain persisted. Ms. West, a nurse practitioner, ordered x-rays, which were normal.

A physical examination is essentially a diagnostic test. When a doctor first sees a patient, the doctor obtains a medical history and then physically examines the patient. These two medical tools enable the physician to diagnose the patient and/or determine whether additional testing is necessary. In some instances, an injury can only be determined through physical examination, as x-rays, MRIs, CT scans and other types of medical tests are of no assistance. In the present claim, Dr. Carroll opined, after obtaining a medical history and conducting a physical examination of claimant, that claimant suffered a lumbosacral strain that was caused by work-related repetitive trauma. Dr. Carroll specifically indicated in his August 22, 2011, report that he would not recommend an MRI at that time and although he did not think at that visit that x-rays were clinically indicated, he would consider ordering them if claimant's symptoms persisted. Claimant met his burden of proof that his repetitive trauma injury was demonstrated by a diagnostic test.

Claimant's employment exposed him to an increased risk to injury. He testified that he repetitively lifted yellow liners, which weighed 35 pounds. He did not recall whether, on

[10] ALJ Preliminary Hearing Order (Nov. 4, 2011) at 4.

the date of his injury, he lifted double liners, which would weigh approximately 60 pounds. It is also significant that on the date of claimant's injury, he also booked tread. Booking tread required claimant to lift 20 pounds approximately 200 times during his shift. Simply put, claimant's employment exposed him to an increased risk of injury.

It is also significant that prior to August 19, 2011, claimant had no back problems. He testified there was no single incident on August 19, 2011, that caused him to experience pain. Nor was there any evidence that claimant's back injury was caused by a nonemployment activity or incident. After reviewing all relevant evidence, the ALJ correctly found the prevailing factor in causing claimant's injury was his work-related repetitive traumas.

Respondent asserts that on the date of his accident claimant lifted double liners, which was a reckless violation of what respondent contends is a safety rule. This Board Member finds that there is insufficient evidence to show that claimant was aware of this alleged safety rule prior to August 19, 2011. No witness testified that he or she told claimant of the safety rule. Two small notices containing the safety rule were posted in claimant's work area, but claimant denied seeing them prior to his injury.

According to Ms. West, claimant told her that he lifted overweight liners, even though his manager told him not to do so. However, scant evidence was presented to show that these overweight liners were double liners. No witness testified that he or she directly gave claimant an order or warning not to lift double liners unassisted.

The notice does not indicate that lifting a double liner unassisted is a safety violation. Instead, the language of the notice appears to be a request and states: "Attention!" and "If there is a liner roll that had 2 liners on it please seek assistance from another booker to remove liners." If claimant was aware of the notice prior to August 19, 2011, the notice's language causes this Board Member to conclude it was not a safety rule, but a request not to lift double liners unassisted.

This Board Member finds respondent failed to prove that claimant acted recklessly. The physical requirements of claimant's job required him to lift liners up to 70 pounds. On the date of claimant's injury, he testified that he was lifting yellow liners. Respondent asserts claimant admitted he was lifting double liners to Ms. West. However, the testimony of Ms. West was that claimant told her he was lifting overweight liners, not double liners. She admitted she did not know specifically what liners claimant was lifting on the date of his injury. Even if claimant had lifted yellow double liners, he would not have lifted in excess of 70 pounds. Claimant on other occasions lifted double liners and observed other employees lifting double liners.

Finally, there is insufficient evidence to show claimant's back injury was the result of lifting double liners. Claimant testified he did not recall if he was lifting single or double

liners on August 19, 2011. No medical evidence was presented to prove that claimant's back injury was caused by lifting double liners.

CONCLUSION

1. Claimant did not meet with personal injury by accident arising out of and in the course of his employment with respondent.

2. The issue of whether claimant's work-related accident is the prevailing factor causing his injury is moot.

3. Claimant met his burden of proof that he met with personal injury by repetitive trauma arising out of and in the course of his employment.

4. Claimant met his burden of proof that claimant's work-related repetitive trauma is the prevailing factor in causing his back injury.

5. Respondent failed to prove by a preponderance of the evidence that claimant recklessly violated a safety rule.

WHEREFORE, the undersigned Board Member affirms the November 4, 2011, Preliminary Hearing Order entered by ALJ Sanders.

IT IS SO ORDERED.

Dated this ____ day of January, 2012.

THOMAS D. ARNHOLD
BOARD MEMBER

c: John J. Bryan, Attorney for Claimant
Frederick J. Greenbaum, Attorney for Respondent
Rebecca Sanders, Administrative Law Judge